DOCUMENT RESUME

ED 308 856 IR 014 064

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TITLE Computer Software: Copyright and Licensing Considerations for Schools and Libraries. ERIC Digest.
INSTITUTION ERIC Clearinghouse on Information Resources, Syracuse, N.Y.
SPONS AGENCY Office of Educational Research and Improvement (ED), Washington, DC.
REPORT NO EDO-IR-89-2
PUB DATE Jul 89
CONTRACT RI88062008
NOTE 4p.
AVAILABLE FROM ERIC Clearinghouse on Information Resources, 030 Huntington Hall, Syracuse University, Syracuse, NY 13244-2340 (free while supply lasts).
PUB TYPE Guides - Non-Classroom Use (055) -- Information Analyses - ERIC Information Analysis Products (071)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Classrooms; *Computer Software; *Copyrights; Elementary Secondary Education; Guidelines; Higher Education; Intellectual Property; *Legal Problems; *Legal Responsibility; Librarians; *Libraries; Library Services; Media Specialists
IDENTIFIERS *Copyright Act 1978; ERIC Digests; Fair Use

ABSTRACT

This digest notes that the terms and conditions of computer software package license agreements control the use of software in schools and libraries, and examines the implications of computer software license agreements for classroom use and for library lending policies. Guidelines are provided for interpreting the Copyright Act, and insuring the fair use of software by libraries, classroom teachers, and students. (GL)

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ERIC DIGEST

July 1989

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Computer Software: Copyright and Licensing Considerations for Schools and Libraries

by Mary Hutchings Reed *

The fact that most computer software purports to be licensed rather than sold has created much confusion for librarians and educators who purchase, loan, or use computer software. Frequently the package containing the software is wrapped in clear plastic (shrink-wrap) through which legends similar to the following appear:

> You should carefully read the following terms and conditions before opening this diskette package. Opening this diskette package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened and your money will be refunded. [or]
>
> Read this agreement carefully. Use of this product constitutes your acceptance of the terms and conditions of this agreement! [or]
>
> ____ is licensed on the condition that you agree to the terms and conditions of this license agreement. If you do not agree to them, return the package with the diskette still sealed and your purchase price will be refunded. Opening this diskette package indicates your acceptance of these terms and conditions.

There are at present no cases concerning the validity of such agreements (which are unilaterally imposed by producers). In the absence of authority to the contrary, one could assume that such licenses are in fact binding contracts;[1] on the other hand, one could argue that such licenses are contracts of adhesion (not bargained for) and thus not binding.

If such licenses are enforceable, by opening a shrink-wrapped package and using the software, the librarian or classroom teacher may become contractually bound by the terms of the agreement.

Following the legends described above are the terms and conditions of the license agreement. The terms vary greatly between software producers and sometimes between programs produced by the same producer. Many explicitly prohibit rental or lending; some limit the program to use on one identified computer or to one user's personal use.

If software is actually licensed rather that sold, the first sale doctrine of Section 109 is not applicable and restrictions on lending and rental contained in the license agreement apply.

Recently a few states have enacted statutes that validate the shrink-wrapped license approach. In effect, these state laws—such as the one in Illinois—make many license terms enforceable. In other words, where there is a question whether a shrink-wrap license is valid (because the transaction looks more like an outright sale), the state legislature has attempted to provide the answer. The only case concerning the validity of such state statutes held in early 1987 that Louisiana's shrink-wrap law was preempted by the federal copyright law to the extent that the provisions thereof were contrary to the federal policies (*Vault Corp. v. Quaid Software Ltd.*, No. 85-2283 [E.D. La. Feb. 12, 1987]).

Library and Classroom Lending

The terms and conditions of each software package's license agreement will purport to control whether or not the software may be loaned to students or library patrons. The license agreement, if valid, is a contract that ought to be carefully reviewed in order to determine whether or not the anticipated use of the software is permitted. If the use to which the library or school wants to put the software is not permitted, the library should not purchase the software. Alternatively, the producer or its agent may be contacted in order to request amendment of the agreement. Many producers will readily agree to library lending of software, but such agreements should be confirmed in writing shortly after they are reached.[2]

Some libraries and schools may ensure that they will be able to lend or otherwise use the software without legal risk by including a statement on purchase orders to the effect that the order should not by filled unless the computer software may be loaned to patrons for use at home or in the library. Just as opening the software packaging arguably results in accepting the terms of the license agreement,

[1] This view is not inconsistent with the view expressed earlier that "licensed for home use only" language on videotapes is not binding for two reasons. First, the language on videotapes may be read as a restatement of the copyright law. Second, the software producer is more clearly making the software subject to the terms of the license by giving the licensee (purchaser) the option to accept the terms by opening the package or to reject them by returning it for a full refund.

[2] The real concern of software producers is unauthorized reproduction of computer software. Copying of software is cheap, relatively easy, and may be damaging to the market for the original software because a copy of a program is just as good as a original, unlike copies of video- and audiotapes or phonorecords which deteriorate after a few generations of copies. As a result, many producers have no objection to lending if safeguards against unauthorized copying exist.

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filling the order arguably results in accepting the terms of the purchase order.

Under the Copyright Law, the copyright owner has the exclusive right to copy or authorize the copying of the program, except to the extent that it must be copied in order to be used. Because mere input of a copyrighted work into a computer results in the making of a copy (for example, software is loaded from a diskette into a computer's memory; the diskette containing the program may be removed, but a "copy" of the program remains in the computer), Section 117 of the Act permits the owner of a computer software program to make or authorize the making of a copy of a program provided that the making of the copy is an essential step in using the program.

A copy may also be made for archival purposes provided that the archival copy is destroyed when possession of the original ceases or that the copy is transferred along with the original program. The purpose of an archival copy is to have a back-up in case the original is damaged or destroyed. Some libraries or classrooms may copy the program and circulate the copy. As long as the original is stored (i.e., "archived") and only one copy at a time is in use, there is little likelihood of an infringement action.[3]

In addition, if the circulating copy is damaged or destroyed, the archival copy may then be copied in order to continue to have one circulating copy and one archival copy. While this is not explicitly set out in the statute, it is implied by Section 117. Because the purpose of the archival copy is as a back-up, once the original is damaged or destroyed, the archival copy may be used. The authority for making another archival copy may be found in the language of Section 117, which provides that the owner of a program may make "*another* copy" provided that it is for archival purposes (emphasis added). The owner of a program may always have one copy for use and one archival copy of the program. Further, Section 108(c) may permit copying of software under limited circumstances as described in Questions 12 to 32 under Library Copying (see read, 1987, pp 8-13). Making any other copies is an infringement for which libraries or schools may be liable unless such copying is fair use.

Section 117 also gives the owner of a program the right to adapt or to authorize an adaptation of the software as an essential step in using the program (for example, adapting the program to the owner's hardware). Such an adaptation may, like a copy, be archived (17 U.S.C. Section 117(2), but the ownership of the adaptation and its archival copy may not be transferred without the permission of the copyright owner.

Unless a license agreement is valid and precludes it, the first sale doctrine applies to software in the same way in which it applies to copyrighted videotapes. Therefore, libraries or classrooms may lend software to patrons and students. The first sale doctrine would also permit display of the software in the library or the classroom.

It should be noted that computer software may be an audiovisual work capable of being performed. To the extent that every computer program is capable of this kind of performance, the same issues of infringing public performances that exist with respect to videotapes exist here, though to a lesser extent. In most cases, the performance component will be so minimal (in a word-processing program, for example) as to be insignificant.

Where library patrons or classroom students are using copyrighted computer software in house, the same public use issues discussed with respect to videotapes are raised, although the problem is simpler in this context. First, the classroom exception may apply to any uses that meet the face-to-face teaching requirements mentioned earlier. Second, to the extent that the classroom exception does not apply, such performances are more readily seen as fair uses—given the proportionately small portion of a program that the audiovisual component constitutes. Third, even videogames, which rely heavily on the audiovisual component, rely less on it than videotapes (where the audiovisual is the entire component of the copyrighted work). In any case, individual use in the classroom or library should be a fair use in the same way that private viewing of a videotape would be.

Library and Classroom Use

Many licenses preclude use of the program on more than one machine at the same time. For example, if such a license is valid, a teacher would ordinarily not be able to take one copy of a program and load it into several machines for use at the same time by different students. Nor would it be permissible under such a license to load the program into one computer to be accessed and used on several different terminals, because almost all license agreements prohibit simultaneous use by several terminals. It is unclear whether such a use also violates copyright laws concerning reproduction rights. Section 117 permits the owner of a program to make a copy as an essential step in using the program. The law does not place a specific limitation on the number of times a copy can be made as an essential step in using the program.

It may be possible that some copying of computer software by libraries and schools will be fair, but it is unlikely that copying an entire program, except as permitted under Section 117, will ever be a fair use, given the effect such a copy has on the market for the original work. If asked about, or aware of unauthorized uses, the library or classroom personnel probably should advise the user that the Copyright Law applies and that the user will be liable for an infringing use.

Given the relative ease of copying software (compared to videotape copying which ordinarily requires two pieces of equipment), a prudent course would be to post notices on the hardware similar to those posted at unsupervised copying machines. Such notices may be required in order to enjoy the benefits of Section 108 of the Copyright Act, which requires "supervised reproducing equipment" to display a notice that making a copy may infringe the Copyright Act in order for libraries to avoid liability for patrons who use the equipment to make copies. If one can make a copy using the hardware, it is probably "reproducing equipment." Such equipment probably is "unsupervised" if it is not actually operated by library personnel, although individuals may be involved in its operation (turning on the equipment, etc.).

[3]The language of Section 117(2), which permits archival copying, actually requires that the "new copy...[be] for archival purposes." only.

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This publication was prepared with funding from the Office of Educational Research and Improvement, U.S. Department of Education, under contract no. RI88062008. The opinions expressed in this report do not necessarily reflect the positions or policies of OERI or ED.